

88-1224

No.

In The

Supreme Court of the United States

October Term, 1983

IN THE MATTER OF THE BOARD OF PHARMACY
DECISION TO PROHIBIT THE USE OF ADVERTISEMENTS
CONTAINING COUPONS FOR PRESCRIPTION DRUGS
AND THE ISSUANCE AND REDEMPTION OF PHARMACY
PRESCRIPTION COUPONS,

CONSUMER VALUE STORES (CVS)
A Division of Melville Corporation,

Appellant.

On Appeal from the Supreme Court of New Jersey

**JURISDICTIONAL STATEMENT
AND APPENDIX FOR APPELLANT**

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QUESTIONS PRESENTED

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1. The questions presented by the appeal may be summarized as follows:

A. Whether the Superior Court of New Jersey, Appellate Division and subsequently the Supreme Court of New Jersey misconceived the principles espoused by the United States Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) which appellant claims to be "controlling" with regard to appellant's case.

B. Whether coupon advertising of prescription drugs is commercial free speech entitled to the protection of the First Amendment to the United States Constitution.

C. Whether the Superior Court of the State of New Jersey, Appellate Division, erred in holding that coupon advertising of prescription drugs, because of the proscription embodied in N.J.S. 45:14-12(f), is unlawful activity excepted from the protection afforded commercial speech under the First Amendment.

D. Whether the Superior Court of the State of New Jersey, Appellate Division, erred in failing to require that the State demonstrate a substantial governmental interest and that the ban on the coupon advertising of prescription drugs is necessary to further that interest.

E. Whether N.J.S. 45:14-12(f) is violative of the Fourteenth Amendment's guarantee of equal protection by entitling only those individuals over the age of 62 to participate in prescription drug coupon advertising programs.

PARTIES

The parties to the proceeding in the Superior Court of New Jersey, Appellate Division, whose judgment is sought to be reviewed are:

1. Consumer Value Stores (CVS), a division of Melville Corporation, appellant.
2. Supermarkets General Corporation, appellant.
3. New Jersey Board of Pharmacy, respondent.

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No.

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October Term, 1983

IN THE MATTER OF THE BOARD OF PHARMACY
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CONSUMER VALUE STORES (CVS)
A Division of Melville Corporation,

Appellant.

On Appeal from the Supreme Court of New Jersey

**JURISDICTIONAL STATEMENT
AND APPENDIX FOR APPELLANT**

PRELIMINARY STATEMENT

Pursuant to Supreme Court Rules 12 and 15, the above appellant, files this, its statement of the basis on which appellant contends that the Supreme Court of the United States has appellate jurisdiction to review on appeal the judgment appealed from herein.

OPINIONS BELOW

The opinion delivered in the Superior Court of the State of New Jersey, Appellate Division is reported in 191 N.J. Super. 7 (App. Div. 1983). A copy of the opinion is appended hereto (Appendix 4a).

The opinion of the New Jersey Attorney General dated October 5, 1981 and the minutes of the relevant meetings of the New Jersey Board of Pharmacy are contained in the appendix attached hereto (8a).

The order of the Supreme Court of New Jersey denying certification is attached hereto (3a).

GROUND ON WHICH JURISDICTION IS INVOKED

i. The appeal herein is from a judgment of the Superior Court of the State of New Jersey, Appellate Division, which held that the declaratory ruling of the New Jersey Board of Pharmacy set forth as follows:

the issuance and redemption of pharmacy
prescription coupons does constitute a violation
of N.J.S.A. 45:14-12(f)

was valid on the ground that coupon advertising was not commercial free speech entitled to First Amendment protection.

ii. The aforesaid judgment of Superior Court, Appellate Division, was entered on the 9th day of July 1983. Review was sought in the Supreme Court of the State of New Jersey and an order dismissing the appeal was entered on the 24th day of October 1983. Appellant filed the notice of appeal to the Supreme Court of the United States on November 23, 1983 in the Superior Court of New Jersey, Appellate Division.

iii. The statutory provision believed to confer on the Supreme Court of the United States jurisdiction of the appeal is Section 1257(2) of Title 28 of the United States Code.

STATUTORY PROVISION INVOLVED

The statute of the State of New Jersey, the validity of which is involved, is Section 14-12(f) of Chapter 45 of the Statutes of New Jersey, found at page 79 of volume 45 of New Jersey Statutes Annotated, which provides:

. . . the following acts are hereby declared to constitute grossly unprofessional conduct for the purpose of this act. . . .

(F) The distribution of premiums or rebates of any kind whatever in connection with the sale of drugs and medications provided, however, that trading stamps and similar devices shall not be considered to be rebates for the purposes of this chapter and provided further that discounts, premiums and rebates may be provided in connection with the sale of drugs and medications to any person who is 62 years of age or older. Before a certificate shall be refused, suspended or revoked, the accused person shall be furnished with a copy of the complaint and given a hearing before the board. Any person whose certificate is so suspended or revoked shall be deemed an unregistered person during the period of such suspension or revocation, and as such shall be subject to the penalties prescribed in this chapter, but such person may, at the discretion of the board, have his certificate reinstated at any time without an examination, upon application to the board. Any person to

whom a certificate shall be denied by the board or whose certificate shall be suspended or revoked by the board shall have the right to review such action by appeal to the Appellate Division of the Superior Court in lieu of prerogative writ.

(See Appendix 26a for text of entire statute N.J.S. 14-12.)

STATEMENT OF THE CASE

Appellant, Consumer Value Stores (CVS), a division of Melville Corporation, owns and operates 42 pharmacies within the State of New Jersey. It has been appellant's practice to include in its newspaper advertisements coupons which entitle the holder thereof to discounts on prescription drugs. Until recently, the propriety of this practice remained virtually unquestioned.

On October 5, 1981, the State Attorney General issued an opinion, a copy of which is included in the appendix attached hereto, holding that reductions on the purchase price of prescription drugs made to the holders of coupons generally found in newspapers and periodicals constitute unlawful rebates within the meaning of N.J.S. 45:14-12(f) (8a). The opinion did not address any constitutional issues. Subsequently, at its meetings of December 9, 1981 and December 23, 1981, the New Jersey Board of Pharmacy adopted the opinion of the Attorney General and sought enforcement of the subject statutory provision (12a, 22a).

Appellant appealed this decision on February 3, 1982 to the Appellate Division of the Superior Court of New Jersey. On July 7, 1983, the Appellate Division upheld the New Jersey Board of Pharmacy's decision and the constitutionality of the aforesaid statute (4a). The court held that coupon advertising was an illegal activity and therefore not entitled to the First Amendment's protection of commercial speech. In addition, the court ruled that

the State did not have the burden of establishing a substantial governmental interest.

Review of the aforesaid judgment was sought in the Supreme Court of the State of New Jersey and an order dismissing the appeal was entered on the 24th day of October 1983. A copy of said order is contained in the appendix attached hereto (3a).

On November 23, 1983, appellant filed a notice of appeal to this Court from the above-mentioned judgment. A copy of said notice of appeal is contained in the appendix attached hereto (1a).

Appellant seeks a declaratory ruling that N.J.S. 45:14-12(f) is constitutionally invalid. Appellant's primary contention is that the statute, as applied to prohibit coupon advertising of prescription drugs, is violative of appellant's right to free speech guaranteed by the First Amendment to the United States Constitution in light of this Court's decision concerning the scope of protection afforded commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) and its progeny.

Appellant also maintains that the statute is unconstitutional on its face as a denial of equal protection. N.J.S. 45:14-12(f) establishes a classification based upon age entitling a particular class of individuals to deferential treatment under the law. Absent legislative findings of past societal discrimination and a showing that the legislation was adopted for the purpose of remedying this past societal discrimination, appellant contends that the statute is constitutionally infirm.

Based on the preponderance of Supreme Court decisions, appellant contends that the appellate court erred in classifying coupon advertising as an illegal activity and erred in removing the burden to prove a substantial governmental interest from the

state. Finally, the court failed to directly address the constitutionality of N.J.S. 45:14-12(f).

Since the New Jersey court has decided a question of substance relating to the construction and application of a state statute, namely N.J.S. 45:14-12(f), and has upheld the validity of such statute against attack upon federal constitutional grounds, it is respectfully submitted by appellant that the United States Supreme Court has jurisdiction to review on appeal the judgment of the Superior Court of New Jersey, Appellate Division.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The reasons why the questions presented by the appeal are so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution, are as follows:

I.

The Superior Court of New Jersey, Appellate Division, and subsequently the Supreme Court of New Jersey misconceived the principles espoused by the United States Supreme Court in *Virginia State Board of Pharmacy v. Va. Citizens Consumer Council, Inc.*

Eight years ago in the landmark decision of *Virginia State Board of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), this Court set to the task of delineating the scope of protection afforded commercial speech under the First Amendment. Therein, the Court struck down, in its entirety, a statute of the State of Virginia which provided that a pharmacist is guilty of unprofessional conduct if he "publishes, advertises or promotes directly or indirectly, in any manner whatsoever, any amount, price, fee, *premium, discount, rebate* or credit terms . . . for any drugs which may be dispensed only by prescription," 425 U.S. at 750 (emphasis added).

Indeed, the Virginia statute sought to prohibit conduct identical to that which was banned by N.J.S. 45:14-12(f). Nevertheless, Subsection (f) remained intact, notwithstanding the fact that the general proscriptions against prescription drug advertising embodied in N.J.S. 45:14-12(c) were repealed in 1977 (L. 1977, c. 120, Section 2, eff. Sept. 29, 1977). It may reasonably be inferred that in repealing the general proscriptions contained in subsection (c), the Legislature was acceding to the constitutional protection extended to truthful prescription drug price information in *Virginia State Board of Pharmacy*. By failing to excise the proscription embodied in Subsection (f), however, the Legislature only partially embraced the principles espoused in that seminal case.

The distinction between prescription drug price advertising, generally, and its more particularized form, coupon advertising, is one which is peculiar to the State of New Jersey. Other adjudications, both prior and subsequent to *Virginia State Board of Pharmacy* recognize that coupons are part and parcel of the protected commercial advertising scheme. *Urowsky v. Board of Regents of the State University of New York*, 76 Misc. 2d 187, 189, 349 N.Y.S. 2d 600, 602 (1973), *aff'd*, 46 A.D. 2d 974, 362 N.Y.S. 2d 46 (1974); *Mississippi State Board of Pharmacy v. Steele*, 317 So. 2d 33 (1975); *Texas State Board of Pharmacy v. Gibson's Discount Center, Inc.*, 541 S.W. 2d 884 (Tex. Cir. App. 1976); *South Odgen C.V.S. v. Ambach*, 493 F. Supp. 374 (S.D.N.Y. 1980).

As will be more fully developed in appellant's brief on the merits, the prohibition against the use of coupon advertisements for the sale of prescription drugs can not be vindicated as a reasonable manner of advertising restriction. In light of the quantity of prescription drugs carried by the average pharmacy, coupon advertising is the most pragmatic and efficient means of advertising discounts. The difficulties encountered by requiring

pharmacists to forego the offering of a blanket discount program and list the discounted prices of each prescription drug in their inventory would effectively prevent pharmacists from engaging in a discount marketing program at all. "The practical effect of banning representation of a discount is the same as banning the discount itself." *Terry v. California State Board of Pharmacy*, 395 F. Supp. 94, 109 (N.D. Cal. 1975), *aff'd without opinion*, 426 U.S. 913 (1976).

In seeking review of the New Jersey Board of Pharmacy's decision to commence enforcement of N.J.S. 45:14-12(f) in the Appellate Division of the Superior Court of New Jersey, it was appellant's position that this Court's decision in *Virginia State Board of Pharmacy* and its progeny would be dispositive. The Appellate Division, however, refused to apply First Amendment commercial speech analysis, holding that the coupon advertising of prescription drugs is advertising of an unlawful activity and therefore excepted from First Amendment protection. 191 N.J. Super. 7, 8 and 9. In so holding, the Appellate Division perpetuated the distinction between prescription drug advertising, generally, and coupon advertising of same.

This distinction is at odds with the holding of this Court and the decisional law of other jurisdictions. The existence of federally guaranteed constitutional rights should not vary from state to state, or be conditioned upon any state's willingness to accept what has been determined by this Court to be the supreme law of the land. In the instant case, the courts of New Jersey have rendered a decision clearly in contrast to the guiding principles espoused by this Court.

II.

There is a dire need to precisely define the scope of the "unlawful activity exception" to the First Amendment.

In the matter *sub judice*, the New Jersey court seized upon this unlawful activity exception and thus refused to apply First Amendment analysis. The Appellate Division distinguished the instant case from those decisional authorities cited by appellant in which restrictions upon commercial advertising were struck down, stating that "in none of them would the proscribed commercial advertising have advertised an activity itself unlawful." 191 N.J. Super. at 9.

In other words, according to the New Jersey court, the state retains the power to prohibit the "distribution" of a premium, discount or rebate, notwithstanding the fact that the state is precluded from proscribing the "advertising" or "promoting" of the same premium, discount or rebate according to this Court's holding in *Virginia State Board of Pharmacy*. The New Jersey court did not address the fact that the ultimate activity proposed by the coupon advertising, that is, for example, that the pharmacist will sell the consumer X prescription drug, for four dollars instead of five, is an entirely lawful transaction.

The reasoning suggested here by the Appellate Division is one of form over substance. By merely labeling any particular stage of a transaction sought to be prohibited as "unlawful", the state may effectively forbid the otherwise lawful dissemination of information concerning an otherwise lawful activity. This Court has wisely held that "'a State cannot foreclose the exercise of constitutional rights by mere labels.' *NAACP v. Button*, 371 U.S. [415] at 419 [(1963)] Regardless of the particular label asserted by the State . . . a court may not escape the task of assessing the First Amendment interest at stake and weighing it against

the public interest allegedly served by the regulation." *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975).

Although the decisions of this Court have provided some guidance in determining whether an activity is unlawful for the purpose of First Amendment analysis, the exact scope of the "unlawful activity exception" has yet to be precisely defined. Certainly where the advertisement proposes an illegal activity of a heinous nature involving substantial state interests such as illegal drug use,* the government should be capable of banning the advertisement *in toto*. But, as will be developed in appellant's brief on the merits, where the state's interest in defining an activity as unlawful is insubstantial, or merely erected as a facade to conceal and regulate the dissemination of an ultimate lawful activity, First Amendment analysis must be employed.

It has recently been suggested that "the policies underlying First Amendment protection of commercial speech require that the 'unlawful activity' exception be limited to those categories of commercial speech already identified by the Supreme Court. . . ." *Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Commission*, 701 F.2d 314 (5th Cir.), *reh. en banc granted*, 701 F.2d 335 (1983).

As the foregoing illustrates, the type of reasoning employed by the New Jersey court in the instant matter causes grave concern. Without more exacting guideposts defining the parameters of the "unlawful activity exception", it is very likely that the exception will swallow the constitutional right. Appellant submits that it is incumbent upon this Court to delineate and limit the scope of this exception in order to ensure that the principles of *Virginia State Board of Pharmacy* and its progeny endure.

* See *Town Tobacconist v. Kimmelman*, 94 N.J. 85 (1983).

III.

The use of prescription drug coupons is of vital interest to the citizens of the State of New Jersey.

Appellant's interest in the dissemination of the information contained in the subject prescription drug coupons is concedely economically motivated. Indeed, appellant derives substantial income from the utilization of a coupon discount program. Nevertheless, "the economic interest hardly disqualifies it for protection under the First Amendment." 425 U.S. at 763.

Of equal significance, however, is the interest of the consumer, the recipient of the coupon advertisement. As was observed by the Court in *Virginia State Board of Pharmacy*, the "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener, by far, than his interest in the day's most urgent political debate." 425 U.S. at 763.

The citizenry of the State of New Jersey are, in a sense, unnamed parties to this action. Numerous editorials, acting as the voice of the consumer, have expressed overwhelming endorsement to the use of coupon advertisements. An editorial of the Newark Star Ledger dated November 19, 1983 is attached hereto as evidence of the public interest in this matter (24a). It is submitted that the public outcry over the prohibition of discount price advertising, particularly the coupon advertising of prescription drugs, demonstrates the need for a full review of the decision rendered by the Superior Court of New Jersey, Appellate Division, in this matter.

CONCLUSION

It is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal.

Respectfully submitted,

WILLIAM I. STRASSER
DONOHUE, DONOHUE,
COSTENBADER & STRASSER
Attorneys for Appellant
Consumer Value Stores, a
Division of Melville Corporation

APPENDIX

**NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES DATED NOVEMBER 23, 1983**

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION**

DOCKET NO. A-2437-8111

**IN THE MATTER OF THE BOARD OF PHARMACY
DECISION TO PROHIBIT THE USE OF ADVERTISEMENTS
CONTAINING COUPONS FOR PRESCRIPTION DRUGS
AND THE ISSUANCE AND REDEMPTION OF PHARMACY
PRESCRIPTION COUPONS,**

**CONSUMER VALUE STORES (CVS) A DIVISION OF
MELVILLE CORPORATION,**

APPELLANT.

**CIVIL ACTION — NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES**

Notice is hereby given that Consumer Value Stores (CVS), A Division of Melville Corporation, the above named Appellant, hereby appeals to the Supreme Court of the United States from the final Judgment of the Superior Court of the State of New Jersey (Appellate Division) entered herein on July 7, 1983.

Review of the aforesaid final Judgment was sought in the Supreme Court of the State of New Jersey and an Order Denying Certification and Dismissing the Appeal was entered on October 24, 1983.

Notice of Appeal

This Appeal is taken pursuant to Section 1237(2) of Title 28 of the United States Code.

DONOHUE, DONOHUE,
COSTENBADER & STRASSER

s/ William I. Strasser
WILLIAM I. STRASSER
Attorney for Appellant,
Consumer Value Stores (CVS), A
Division of Melville Corporation

DATED: November 23, 1983

**DENIAL OF PETITION FOR CERTIFICATION TO THE
SUPREME COURT OF NEW JERSEY FILED OCTOBER 25,
1983**

C-118 SEPTEMBER TERM 1983

21,598

**IN RE: BOARD OF PHARMACY DECISION TO PROHIBIT
THE USE OF ADVERTISEMENTS CONTAINING COUPONS
FOR PRESCRIPTION DRUGS AND THE ISSUANCE AND
REDEMPTION OF PHARMACY COUPONS.**

(Consumer Value Stores, a Division of Melville Corporation)
Petitioner

To the Appellate Division, Superior Court:

A petition for certification of the judgment in
A-2269/2457-81T3 having been submitted to this Court, and the
Court having considered the same;

It is ORDERED that the petition for certification is denied
with costs; and it is further

ORDERED that the appeal in the within matter is dismissed
pursuant to R. 2:12-9.

WITNESS, the Honorable Robert L. Clifford, Presiding
Justice, at Trenton, this 24th day of October, 1983.

s/ Stephen W. Townsend
Clerk

**OPINION OF THE SUPERIOR COURT OF NEW JERSEY —
APPELLATE DIVISION FILED JULY 7, 1983**

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION**

A-2269-81T3

A-2457-81T3

**IN THE MATTER OF THE BOARD OF PHARMACY
DECISION TO PROHIBIT THE USE OF ADVERTISEMENTS
CONTAINING COUPONS FOR PRESCRIPTION DRUGS**

SUPERMARKETS GENERAL CORPORATION,

Appellant,

and

**CONSUMER VALUE STORES (CVS) A DIVISION OF
MELVILLE CORPORATION,**

Appellant.

Argued June 6, 1983 — Decided July 7, 1983

**Before Judges Milmed, Morton I. Greenberg and
Furman.**

**On appeal from Decision of the Board of
Pharmacy of New Jersey.**

**Robert G. Rose argued the cause for appellant
Supermarkets General Corporation (Pitney,**

Opinion of the Superior Court of New Jersey

Hardin, Kipp & Szuch, attorneys; Hal R. Crane, of counsel; Mr. Rose and Evelyn R. Storch, on the briefs).

William I. Strasser argued the cause for appellant Consumer Value Stores (Donohue, Donohue, Costenbader & Strasser, attorneys; Mr. Strasser, of counsel and on the briefs).

Douglas J. Harper, Deputy Attorney General, argued the cause for respondent Board of Pharmacy (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel; Thomas H. Shar, Deputy Attorney General, on the brief).

PER CURIAM

Appeal is brought pursuant to R. 2:2-3(a)(2) from a declaratory ruling of the State Board of Pharmacy that "the issuance and redemption of pharmacy prescription coupons does constitute a violation of *N.J.S.A. 45:14-12(f)*." The declaratory ruling was in response to inquiries from pharmacists as to the legality of coupon advertising of prescription drugs providing for a rebate in purchase price upon redemption of a coupon.

N.J.S.A. 45:14-12(f) declares the distribution of premiums or rebates of any kind in connection with the sale of drugs and medications to be grossly unprofessional conduct by a pharmacist subjecting him to suspension or revocation of his registration certificate, with an exception for sales to persons 62 years of age or older.

Opinion of the Superior Court of New Jersey

Accordingly, coupon advertising of prescription drugs is advertising of an unlawful activity, the distribution of a rebate proscribed as grossly unprofessional conduct under *N.J.S.A. 45:14-12(f)*. The declaring ruling under challenge restates what is literally so; the issuance and redemption of pharmacy prescription coupons constitute a violation of *N.J.S.A. 45:14-12(f)*.

Appellants' contention on appeal is that coupon advertising is commercial free speech entitled to the protection of the First Amendment to the Federal Constitution. They rely upon decisional authorities that state restrictions on commercial advertising violate First Amendment rights. But none of these authorities is directly in point; in none of them would the proscribed commercial advertising have advertised an activity itself unlawful, as on this appeal. The United States Supreme Court in *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 772 (1976), expressly excepted advertising of illegal transactions from its holding and in *Central Hudson Gas v. Public Service Comm'n*, 447 U.S. 557, 563 (1980), made clear that: "The government may ban . . . commercial speech related to illegal activity." *Central Hudson Gas* set out a four-part analysis for determining whether a ban on commercial advertising infringes the First Amendment. The first criterion is: "For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading."

Appellants seize on the second criterion in *Central Hudson Gas*, that is, whether the asserted governmental interest in the ban on commercial advertising is "substantial." They argue that the State cannot meet "its burden" of establishing that *N.J.S.A. 45:14-12(f)* is in furtherance of a substantial governmental interest. In so arguing appellants would shift from themselves the burden of establishing the constitutional invalidity of *N.J.S.A. 45:14-12(f)*.

Opinion of the Superior Court of New Jersey

We reject appellants' argument. The burden on the issue of the constitutionality of *N.J.S.A. 45:14-12(f)* did not shift to the State but rested with appellants, who patently failed to meet it in the face of the rule governing judicial review of statutes recognized in *Reingold v. Harper*, 6 *N.J.* 182, 194 (1951): "Every reasonable presumption is to be made in favor of the validity of the legislative act."

The United States Supreme Court and the highest and other courts of this State have sustained the constitutionality of price control legislation in businesses affected with a public interest, such as the pharmacy business, as an exercise of the police power to curtail unfair competition and unfair sales practices. See, e.g., *Nebbia v. People of State of New York*, 291 *U.S.* 502 (1934); *Fried v. Kervick*, 34 *N.J.* 68 (1961); *Lane Distributors, Inc. v. Tilton*, 7 *N.J.* 349 (1951); *State Board of Milk Control v. Newark Milk Co.*, 118 *N.J. Eq.* 504 (E. & A. 1935); and *Supermarkets Gen. Corp. v. Sills*, 93 *N.J. Super.* 326 (Ch. Div. 1966).

We conclude that appellants have failed to establish the invalidity of the declaratory ruling of the State Board of Pharmacy under appeal. We therefore dismiss the appeal.

I here certify that the foregoing is a true copy of the original on file in my office.

s/ Elizabeth McLaughlin
Clerk

**OPINION OF THE NEW JERSEY ATTORNEY GENERAL
DATED OCTOBER 5, 1981**

**STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW**

STATEHOUSE ANNEX

October 5, 1981

Board of Pharmacy
1100 Raymond Boulevard
Newark, New Jersey 07102

Dear Members of the Board:

A question has arisen as to whether coupons found in newspapers and/or periodicals of general circulation which entitle the holder thereof to a stipulated reduction in the purchase price of a prescription drug are consistent with the pharmacy law. The coupons under consideration essentially offer a prospective purchaser of a prescription drug a stipulated reduction or allowance against the total cost of the drug or, in certain cases, allow for a free prescription up to a stipulated dollar amount of free merchandise in the store. For the following reasons, it is our opinion that reductions and/or allowances on the purchase price of a prescription drug made to the holders of these coupons constitute an unlawful rebate within the meaning of the pharmacy law.

The answer to your inquiry is governed by the general prohibition against the distribution of premiums or rebates set forth in N.J.S.A. 45:14-12(f). That statutory section prohibits:

Opinion of the New Jersey Attorney General

"The distribution of premiums or rebates of any kind whatever in connection with the sale of drugs and medications provided, however, that trading stamps and similar devices shall not be considered to be rebates for the purposes of this chapter and provided further that discounts, premiums and rebates may be provided in connection with the sale of drugs and medications to any person who is 62 years of age or older."

In an opinion to the Board dated June 3, 1980 it was concluded that the waiver of a copayment by a pharmacy in a third party plan constituted an unlawful rebate under this same statutory section. Our analysis of this statutory language and of the presumed legislative intent led us to conclude that the term "rebate" means any allowance or deduction from a price otherwise offered. Since our reasoning there has direct application to this inquiry as well, it is profitable to set it forth herein. After concluding that case law has generally defined a rebate to mean a price reduction or allowance,* it was further pointed out that:

"The first clause of N.J.S.A. 45:14-12(f) refers simply to the distribution of 'premiums or rebates,'

* Case law has generally defined the term "rebate" as an allowance by way of discount or drawback or a deduction of a gross amount. *State v. Loucks*, 32 Wyo. 26, 228 P. 632, 634 (1924). In a variety of contexts the term means not so much the physical handing back of money as a reduction of a set price. It has been held in an insurance case that a rebate within the meaning of a statute prohibiting the giving of rebates was found to be a deduction from a stipulated premium allowed pursuant to an antecedent contract. *Tucson Federal Savings & Loan Ass'n v. Aetna Investment Corp.*, 74 Ariz. 163, 245 P. 2d 423, 427 (1952).

Opinion of the New Jersey Attorney General

yet the proviso concerning senior citizens, added in 1973, L. 1973, c. 125, speaks of 'discounts, premiums and rebates . . .'. A word or phrase is known by the company it keeps, *Howard v. Harwood's Restaurant Co.*, 25 N.J. 72, 89-90 (1957), and here the legislature must have considered the three words, especially 'rebates' and 'discounts,' as nearly synonymous. Indeed, the 1973 amendment authorizing discounts to senior citizens would make no sense whatever if previously such discounts had not been comprehended, and therefore prohibited, by the word 'rebates.' Furthermore, the anti-rebate provision entered the statute in 1965, L. 1965, c. 120, to the end of suppressing discriminatory treatment of consumers patronizing pharmacies—an evil which could be promoted through price allowance, irrespective of whether the allowance were effected through an actual handing back of cash tendered or through the simple reduction of price."

An examination of these coupons in light of our interpretation of the statutory prohibition clearly indicates they effectively grant to the holder thereof a reduction or allowance from the price of a prescription drug which a prospective purchaser would otherwise be required to pay. For these reasons, you are advised that either a reduction or an allowance against the price of a prescription drug or the offering of free merchandise as a condition of the purchase of a prescription drug to the holder of a coupon constitutes the offering of an unlawful rebate under the pharmacy statute.

11a

Opinion of the New Jersey Attorney General

Very truly yours,

JAMES R. ZAZZALI
Attorney General

By Theodore A. Winard
Assistant Attorney General

TAW:jc

**MINUTES OF MEETING OF THE BOARD OF PHARMACY
DATED DECEMBER 9, 1981**

NEW JERSEY BOARD OF PHARMACY

MINUTES OF THE MEETING OF DECEMBER 9, 1981

Call To Order

A quorum being present, the Meeting of the Board of Pharmacy was called to order by Board President Sheldon Moed at 9:00 a.m., Room 325, 1100 Raymond Boulevard, Newark, New Jersey.

Sunshine Law

The Board President announced publicly that, pursuant to the State of New Jersey "Open Meeting Act", Chapter 321, PL 1975, adequate notice of this meeting was provided to the Secretary of the State of New Jersey specifying the time, place, and manner in which notice was provided.

Roll Call

Present at the Roll Call were Board Members Brach, Dunn, Heymann and Moed. Board Members Levin, Luger and Scara had notified the office that they would not be attending. Also present at the meeting were DAG Thomas Shar, Head Clerk Joan Levinson and Senior Clerk Stenographer Kathleen Lorenc. Attending portions of the meeting were Supervisor of the Enforcement Bureau, Robert Elker, Special Investigator, Sara Kent, Pasquale Gervasi, Essex County Pharmaceutical Association, Allison McConnell, Boots Pharmaceutical, Jim Dougherty, Jack Futterman and Bob Wunderle, Pathmark, Charles Marciante - AFL-CIO, Stanley Grant, The Upjohn Co., Robert G. Rose, Pitney, Hardin, Kipp and Szuch and Ron Stepniski, The Record, Hackensack.

Minutes of Meeting Dated December 9, 1981

Minutes of the Meeting of November 25, 1981

Page 1 — On motion by Board Member Brach, seconded by Board Member Heymann, at the Board meeting of December 9, 1981, there should be a discussion on Coupons. The vote of the Board was as follows: Voting aye were Board Members Brach, Dunn, Heymann, Levin, Moed and Scara.

Page 2 — Hearing, November 18, 1981, add Board Member Luger.

Page 3 — Add: S. Alan Axelrad
Clover Leaf Pharmacy
Lakeside Blvd.
Landing, N.J. 07850

Mr. Axelrad appeared and presented testimony in mitigation of the charges brought pursuant to the above cited inspection report. Upon discussion of the testimony heard the Board reaffirmed the penalty of \$275.00 for violations.

Page 4 — After Manhattan Pharmacy include letter re: scale not sealed.

Page 5 — After S. Reses Apothecary there should be no letter for scales not sealed.

Page 7 — Should read under John Dente "and a suspension of his license for 3 months as of January 1, 1982". State of Tennessee should read Board of Pharmacy of the State of Tennessee.

Minutes of Meeting Dated December 9, 1981

Page 10 — Under American Medical Weight Association
add: Department of Health.

A motion to accept the minutes as amended was made by Board Member Brach, seconded by Board Member Heymann. The vote of the Board was as follows: Voting aye were Board Members Brach, Dunn, Heymann and Moed.

Permits

Eckerd Drugs #718	Remodeling approved	
Vineland	Patient profile	\$75.00

Parkway Central Pharmacy	New Pharmacy
East Orange	Permit approved

Singac Phar. & Surgical Supply	Change of location
Little Falls	Permit approved
	Outdated merchandise \$25.00

Letter re: sealing of balances
and checking with physician
re: giving of less medication.

A motion to accept the above cited permits as presented was made by Board Member Heymann, seconded by Board Member Dunn. The vote of the Board was as follows: Voting aye were Board Members Brach, Dunn, Heymann and Moed.

Philip Alvarez

Upon discussion of the above cited case a motion was made by Board Member Heymann, seconded by Board Member Dunn.

Minutes of Meeting Dated December 9, 1981

The Board accepted the Consent Order whereby the license of Philip Alvarez is hereby revoked. The vote of the Board was as follows: Voting aye were Board Members Brach, Dunn, Heymann and Moed.

Law Exams — Reciprocal and Re-examination

Peter L. Ricupero	Connecticut	84
Robert S. Spiel	Massachusetts	94
Rosa L. Weiss	New York	84
Gerald H. Yablin	Pennsylvania	76
Patricia Andrulovich	re-examination	94

On motion by Board Member Dunn, seconded by Board Member Heymann the above cited candidates have been certified. The vote of the Board was as follows: Voting aye were Board Members Brach, Dunn, Heymann and Moed.

Inspection Reports

1. Harris Pharmacy 8-1408.3
Freehold

Letter to be sent regarding the elimination of duplicate profiles

2. Shoprite 8-2392.5
West Long Branch

Missing texts \$25.00

Letter to be sent regarding generic compliance and the maintenance of profile record.

Minutes of Meeting Dated December 9, 1981

3. Danzig Pharmacy 8-1158.7
Union

Letter to be sent regarding being more careful with dispensing.

4. Regina Pharmacy 8-1369.4
Atlantic City

Missing equipment	\$25.00
Missing texts	<u>25.00</u>
	\$50.00

Letter to be sent regarding scales not sealed.

5. Ivens 8-3076.1
Ventnor

Letter regarding generic substitution
Two pharmacist certificates not posted \$50.00
(Each pharmacist to be fined \$25.00)

6. Woods Pharmacy 8-380.5
Freehold

Letter on patient profile

On motion by Board Member Heymann, seconded by Board Member Dunn the recommendations on the above reports were approved. The vote of the Board was as follows: Voting aye were Board Members Brach, Dunn, Heymann and Moed.

*Minutes of Meeting Dated December 9, 1981***Coupons — Rebates**

A discussion was held in connection with the above cited matter, in which Board Member Sheldon Moed abstained from participating because of the possibility of conflict of interests. Consequently, the Board met as a Committee.

The Committee heard from: Charles H. Marciante, President — New Jersey AFL-CIO; Jack Futterman, Vice President — General Merchandising of Pathmark; Pasquale Gervasi, representative of Essex County Pharmacy Society; Allison McConnell of Boots Pharmaceutical. Written statements were submitted by Mr. Marciante and by Jack Futterman.

Member Brach asked DAG Thomas Shar whether the opinion of the Attorney General was binding upon the Board, to which the reply was in the affirmative.

A motion was thereafter made by Board Member Brach, seconded by Board Member Dunn that the Committee report to the full Board and recommend to the Board that it advise all of the pharmacies effective as of February 15, 1982, the Board will view the coupon rebates on prescription drugs as a violation and appropriate penalties will be imposed. The vote of the Committee was as follows: Voting aye were Board Members Brach, Dunn and Heymann.

A further motion was made by Board Member Heymann, seconded by Board Member Dunn that there should be a specific fine published. The vote of the Committee was as follows: Voting aye were Board Members Brach, Dunn and Heymann.

Minutes of Meeting Dated December 9, 1981

The Board decided to hold in abeyance any action regarding Boots Pharmaceutical Company pending further information from Boots Pharmaceutical Company.

Bernard Buck

Defer until January 27, 1982, for the above cited case to be discussed subject to there being a quorum.

Per Diem Compensation for Board Members

A motion was made by Board Member Brach, seconded by Board Member Heymann that the proposed new rule should be as attached. The vote of the Board is as follows: Voting aye were Board Members Brach, Dunn, Heymann and Moed.

A motion was made by Board Member Heymann, seconded by Board Member Brach that a special committee be set up to handle special problems in the absence of the Executive Secretary. The Board President, Sheldon Moed, will appoint the committee. The vote of the Board is as follows: Voting aye were Board Members Brach, Dunn, Heymann and Moed.

Christine Keeno — Continuing Education Request

Mrs. Keeno, Garden State Pharmaceutical Association, to be sent a continuing education form for approval by the Council on Continuing Education.

Leonard Soschin, R.P. and Robert Soschin, R.P.
Greene's Pharmacy

The Board was alerted to the opinion of the Appellate Division whereby the Board must assess disciplinary sanctions and indicate

Minutes of Meeting Dated December 9, 1981

its reasons therefore. This matter will be undertaken on December 23, 1981.

New Jersey Pharmaceutical Association and Bergen County Pharmaceutical Society — Pocket Cards

Upon discussion the Board came to the conclusion that pocket cards should be issued to each registered pharmacist for proper identification as it is not feasible for pharmacists to carry renewal licenses with them. A motion was made by Board Member Heymann, seconded by Board Member Dunn that the Board direct the institution of the issuance of pocket cards. The vote of the Board is as follows: Voting aye were Board Members Brach, Dunn, Heymann and Moed.

Aaron Halstater — Exemption from C.E. credits

A motion was made by Board Member Heymann, seconded by Board Member Dunn that there be no waiver of continuing education credits. The vote of the Board was as follows: Voting aye were Board Members Brach, Dunn, Heymann and Moed.

John Pietsch — Internship

A motion was made by Board Member Brach, seconded by Board Member Dunn that we accept Mr. Pietsch's credentials for internship and let him sit for the Boards for registration upon proof of employment. The vote of the Board was as follows: Voting aye were Board Members Brach, Dunn, Heymann and Moed.

Jimmy Lin — Internship

Minutes of Meeting Dated December 9, 1981

The Board requested that the Head Clerk should contact Jimmy Lin for more information regarding his practice of pharmacy in California.

Joan Rossi — Split Internship

The Board approved Joan Rossi's request for split internship.

United Hospitals — Newark — Pharmacists Delivering Medication

Defer until next agenda.

Medi Mart Pharmacy — Fred Lubinger

Defer for future action after contacting Department of Health about hypodermic needle prescriptions.

Metro Drugs — Advertisement

The Board came to the conclusion that the advertisement submitted was not illegal.

Nonrenewal of Pharmacy Permits due July 1, 1981

A motion was made by Board Member Brach, seconded by Board Member Heymann that it be the policy of the Board that they enforce the scheduled penalty for nonrenewal of pharmacy permits of \$100.00 per month as of July, 1982. A fine of \$100.00 is to be assessed for nonrenewal of the permits due July 1, 1981. The vote of the Board is as follows: Voting aye were Board Members Brach, Dunn, Heymann and Moed.

Minutes of Meeting Dated December 9, 1981

Mitigating Circumstances Regarding Penalties

Re: Shop Rite Pharmacy, Neptune City
Village Pharmacy, Marmora

Upon discussion of the above cited case on a motion by Board Member Dunn, seconded by Board Member Heymann, the penalties should be sustained in the above case. The vote of the Board was as follows: Voting aye were Board Members Brach, Dunn, Heymann and Moed.

Mitigating Circumstances Regarding Penalties

Re: Shorbello Pharmacy, Lodi

On a motion by Board Member Dunn, seconded by Board Member Heymann, the penalty of \$25.00 regarding violation of 13.39 9:6 dispensing USP/NF stayed. Penalty of \$200.00 sustained. Voting aye were Board Members Brach, Dunn, Heymann and Moed.

Respectfully submitted,

Joan Levinson
Head Clerk

**MINUTES OF MEETING OF THE BOARD OF PHARMACY
DATED DECEMBER 23, 1981**

2. Ocean Pharmacy 8-2931.1
 Ocean City

Missing USP/NF

\$25.00

A motion was made by Board Member Heymann, seconded by Board Member Levin that the recommendations on the above reports be approved. Voting aye were Board Members Brach, Dunn, Heymann, Levin, Luger, Moed, Scara and Weinert.

Law Exams — Reciprocals and Transfer of Grades

Cynthia B. Johnson	Colorado	88
Spann M. Watson	Dist. of Columbia	100
Roberta D. Tucker	Transfer of grades	
	from Pennsylvania	94

On motion by Board Member Dunn, seconded by Board Member Luger the above cited candidates have been certified. Voting aye were Board Members Brach, Dunn, Heymann, Levin, Luger, Moed, Scara and Weinert.

Resolution of Commendation

A motion was made by Board Member Luger and unanimously seconded that in the absence of the Executive Secretary, Head Clerk Joan Levinson acted above and beyond the call of duty. Her performance was commendable and duly appreciated.

Welcome

The Board welcomed new Board Member William Weinert and the appointment of the new Executive Secretary, Reni Erdos, and wished them well.

Minutes of Meeting Dated December 23, 1981

NABP Newsletter Publication of Board Ruling

On motion by Board Member Dunn, seconded by Board Member Levin the Board will publish its declaratory ruling in the NABP New Jersey Newsletter that the issuance and redemption of pharmacy prescription coupons does constitute a violation of NJSA 45:14-12(f). Appropriate penalties pursuant to NJSA 45:1-14 *et seq* will be applied as of March 1, 1982. This ruling does not apply to manufacturer's coupons at this time or the issuance and redemption of coupons involving premiums and rebates to persons who are 62 years of age or older. Voting aye were Board Members Dunn, Levin, Luger, Scara and Weinert. Voting no was Board Member Brach, Board Members Heymann and Moed abstained.

EDITORIAL OF NEWARK STAR-LEDGER DATED NOVEMBER 19, 1983

BITTER PILL

New Jersey consumers will have one reason less to be thankful this Thanksgiving Day. It's the last day that store coupons may be redeemed for discounts on prescription drugs.

The demise of the dollar-off coupon is a classic example of government working for a special interest at the expense of the public at large. One supermarket chain estimates that its customers saved a half-million dollars on prescriptions.

Between 1976 and sometime in 1981, the State Board of Pharmacy never once challenged the practice or questioned the professionalism of the pharmacies that were using money-saving coupons. In 1981, however, the board issued an order to bar the coupons at the insistence of some independent pharmacists who, in point of fact, are in competition with the pharmacies that choose to use coupons as a merchandising tool.

The courts have upheld the legality of the pharmacy board's ban, relying on a state law that prohibits rebates on prescription drugs. Whether the discount is a rebate is arguable, but the law itself could be changed by a simple act of the Legislature.

Senators and assemblymen, history shows, are ever responsive to the campaign contributions from special-interest lobbies, and they have therefore made no move to save the public from this onerous and useless provision in the statute.

In defense of the ban, Harold Bobrow, vice president of the New Jersey Pharmaceutical Association, commented: "I feel they (discount coupons) are degrading health care. You can't have drugs and jelly beans sold in the same atmosphere."

Editorial

Rubbish! These same pharmacies not only sell drugs and jelly beans, they also honor discount coupons on non-prescription drugs, like aspirin and aspirin substitutes, and a variety of other merchandise.

Dollar-off coupons are an effective traffic-builder for enterprising pharmacies. They have saved consumers substantial sums of money while encouraging healthy competition, and their ban is not in the public interest.

How quickly New Jerseyans could resolve this issue if only the state had an Initiative and Referendum amendment in its Constitution. That not being the case, as yet, consumers can only take the less direct route, letting their legislators know they want action in legalizing the pharmacy discount coupon.

Beyond that, consumers should urge Gov. Thomas Kean and the Legislature to undertake jointly an investigation of the performance of all professional boards in the state, to determine whether they are motivated by concern for the public good or self-enrichment.

RELEVANT STATUTE

45:14-12. Refusal of examination; suspension or revocation of certificate; person deemed unregistered during suspension or revocation; hearing; court review

The board may refuse an application for examination or may suspend or revoke the certificate of a registered pharmacist or a registered assistant pharmacist for any of the following causes: When the application or registration is shown to have been obtained by misrepresentation or fraudulent means or when the applicant or registrant is guilty of chronic or persistent inebriety, or has been adjudged guilty of violating any State or Federal law or any law of the District of Columbia or of any territory of the United States relating to the practice of pharmacy, or relating to the dispensing of drugs, or has been convicted of a crime involving moral turpitude, or has impersonated an applicant for registration before the board or has been convicted of knowingly, intentionally or fraudulently adulterating or causing to be adulterated drugs, chemicals or medicinal preparations or has sold or caused to be sold adulterated drugs, chemicals or medicinal preparations knowing, or having reason to know, that same were adulterated, or has procured or attempted to procure registration for another by misrepresentation or fraudulent means, and the board shall refuse an application for examination or suspend or revoke the certificate of a registered pharmacist or a registered assistant pharmacist when the applicant or registrant is shown to be

Relevant Statute

addicted to the use of narcotic drugs, or has been convicted of violating any law of this or any other state or of the United States relating to narcotic drugs or has been adjudicated an incompetent, or is shown to have any abnormal physical or mental condition which threatens the safety of persons to whom said applicant or registrant might sell or dispense prescriptions, drugs, chemicals, medicinal preparations or devices or for whom he might manufacture, prepare or package, or supervise the manufacturing, preparation or packaging of prescriptions, drugs, chemicals, medicinal preparations or devices. In addition, the board may refuse an application for examination or may suspend or revoke the certificate of a registered pharmacist or a registered assistant pharmacist upon proof satisfactory to the board that such registered pharmacist or such registered assistant pharmacist is guilty of grossly unprofessional conduct and the following acts are hereby declared to constitute grossly unprofessional conduct for the purpose of this act:

a. Paying rebates or entering into an agreement for payment of rebates to any physician, dentist or other person for the recommending of the services of any person.

b. The providing or causing to be provided to a physician, dentist, veterinarian or other persons authorized to prescribe, prescription blanks or forms bearing the pharmacist's or pharmacy's name, address or other means of identification.

Relevant Statute

c. (Deleted by amendment.)

d. The claiming of professional superiority in the compounding or filling of prescriptions or in any manner implying professional superiority which may reduce public confidence in the ability, character or integrity of other pharmacists.

e. Fostering the interest of one group of patients at the expense of another which compromises the quality or extent of professional services or facilities made available.

f. The distribution of premiums or rebates of any kind whatever in connection with the sale of drugs and medications provided, however, that trading stamps and similar devices shall not be considered to be rebates for the purposes of this chapter and provided further that discounts, premiums and rebates may be provided in connection with the sale of drugs and medications to any person who is 62 years of age or older. Before a certificate shall be refused, suspended or revoked, the accused person shall be furnished with a copy of the complaint and given a hearing before the board. Any person whose certificate is so suspended or revoked shall be deemed an unregistered person during the period of such suspension or revocation, and as such shall be subject to the penalties prescribed in this chapter, but such person may, at the discretion of the board, have his certificate reinstated at any time without an examination, upon application to the board.

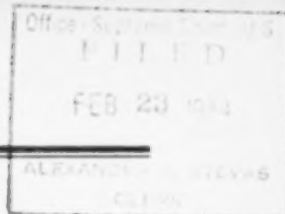
Relevant Statute

Any person to whom a certificate shall be denied by the board or whose certificate shall be suspended or revoked by the board shall have the right to review such action by appeal to the Appellate Division of the Superior Court in lieu of prerogative writ.

g. Advertising of prescription drug prices in a manner inconsistent with rules and regulations promulgated by the Director of the Division of Consumer Affairs; provided, however, no such advertising of any drug or substance shall be authorized unless the Commissioner of Health shall have determined that such advertising is not harmful to public health, safety and welfare.

Amended by L.1952, c. 351, p. 1132, §1; L.1953, c. 43, p. 814, §69; L.1965, c. 120, §1; L.1973, c. 125, §1, eff. May 10, 1973; L.1977, c. 240, §2, eff. Sept. 29, 1977.

NO. 83-1224



IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IN THE MATTER OF THE BOARD OF PHARMACY
DECISION TO PROHIBIT THE USE OF ADVERTIS-
TISEMENTS CONTAINING COUPONS FOR PRE-
SCRIPTION DRUGS.

On Appeal from the Superior Court of New Jersey,
Appellate Division

**MOTION OF APPELLEE NEW JERSEY STATE
BOARD OF PHARMACY TO DISMISS OR AFFIRM**

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On the Brief

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SCRIPTION DRUGS.**

**On Appeal from the Superior Court of New Jersey,
Appellate Division**

**MOTION OF APPELLEE NEW JERSEY STATE
BOARD OF PHARMACY TO DISMISS OR AFFIRM**

The appellee New Jersey State Board of Pharmacy respectfully moves pursuant to Rule 16.1(b) and (d) to dismiss this appeal or for summary affirmance of the judgment of the Appellate Division of the Superior Court of New Jersey on the grounds that the decision below was manifestly correct and does not present substantial constitutional questions in need of further argument.

Counter-Statement of the Case

Appellant Consumer Value Stores (CVS) would have this Court review by appeal a decision of the Appellate

Division of the Superior Court of New Jersey* which upheld the validity of a statutory ban on one limited mechanism of prescription advertising—discount coupons—as the advertising of an unlawful activity, “rebating”. The Appellate Division found that CVS had patently failed to demonstrate that the governing statute N.J.S.A. 45:14-12(f) was unconstitutional and further concluded that “price control legislation in businesses affected with a public interest, such as the pharmacy business” is sustainable “as an exercise of the police power to curtail unfair competition and unfair sales practices.” *In the Matter of the Board of Pharmacy Decision to Prohibit the Use of Advertisements Containing Coupons*, 191 N.J. Super. 7, — A. 2d — (App. Div. 1983) (A. 4).

The Appellate Division decision unanimously upheld a declaratory ruling of the New Jersey State Board of Pharmacy which prohibited the issuance and redemption of pharmacy prescription coupons as an unlawful rebate (A. 17; A. 23; A. 8-A. 10). The decision of the Board permitted the continued advertising of prescription drug prices while outlawing this limited mechanism—discount coupons—as an unfair competitive device.

In seeking further review of the decision, appellant fails to recognize that some limitations on advertising are constitutionally permissible, and the New Jersey Legislature, having made a judgment that the activity of “rebating” is harmful to the public in the context of the highly regulated profession of pharmacy, could properly

* Review of the judgment sought in the Supreme Court of the State of New Jersey by CVS has been twice denied. A petition for certification of the judgment of the Appellate Division was denied and the appeal dismissed on October 24, 1983 (A. 3). Similarly, a motion for reconsideration of the denial of the petition for certification was denied on January 17, 1984 (AA. 1).

proscribe the advertising of same. For these reasons, the decision below is manifestly correct and should be summarily affirmed or, in the alternative, as no substantial federal question has been presented, the appeal should be dismissed.

A R G U M E N T

The Appellate Division of the Superior Court of New Jersey properly held that a prohibition of prescription discount coupons (rebates) is a permissible exercise of the police power to curtail unfair sales practices and unfair competition and that government may ban commercial advertising of an unlawful activity and no substantial constitutional issue having been presented, this Court should dismiss the appeal or summarily affirm the ruling below.

Despite appellant's efforts to cast the decision below as in substantial conflict with the precedents of this Court and to present a "dire need" for this Court to define the scope of the "unlawful activity exception" to the First Amendment, the Appellate Division's opinion is self-evidently in concert with this Court's decisions in the area of commercial speech.

The challenged declaratory ruling of the Board and the underlying statutory prohibition ultimately rest on the simple proposition that under the precedents of this Court regarding commercial speech by professionals, the State may ban the advertising of an illegal activity or misleading advertising. Since the ban on prescription discount coupons fits squarely within the exceptions set forth in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) and its progeny,

which recognize the State's continued ability to regulate commercial speech which is false, misleading, deceptive or which proposes a transaction illegal in itself, *id.* at 772, the decision of the New Jersey court upholding the declaratory ruling was clearly correct.

Initially it should be noted that in examining the extent of protection afforded by the First Amendment to commercial speech, this Court held in the landmark case of *Virginia Pharmacy Board* that a state could not impose a total ban on all advertising of the prices of prescription drugs. *Id.* at 13-25. The entire focus of the Court however was on the absolute ban on advertising; the Court was not presented with a legislative determination as in the instant case that a particular activity, "rebating"* was harmful to the public**.

The Court in *Virginia Pharmacy Board* specified that state regulation of commercial speech remains permissible. In this regard, the decision amplified:

* CVS claims that a distinction between prescription drug advertising and "coupons" is peculiar to the State of New Jersey (Ab7). It is important to note, however, that the New Jersey prohibition is against the activity of "rebating"; "coupons" are only proscribed as incidental to that activity. Furthermore, at least two of the cases cited by CVS for the proposition that coupons are part of the protected commercial advertising scheme did not involve discount coupons at all. See *Texas State Board of Pharmacy v. Gibson's Discount Center, Inc.*, 541 S.W. 2d 884 (Tex. Cir. App. 1976) and *Mississippi State Board of Pharmacy v. Steele*, 317 So. 2d 33 (1975).

** Support for the view that the New Jersey legislature has determined to leave the protection of the anti-rebate provision intact can be found in its repeal of a general proscription against prescription drug advertising found in N.J.S.A. 45:14-12(c) following the *Virginia Pharmacy Board* decision while preserving the anti-rebate provision of the same statute, N.J.S.A. 45:14-12(f). (L. 1977, c. 240, §2).

Untruthful speech, commercial or otherwise has never been protected for its own sake [citations omitted]. Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a state's dealing effectively with this problem. The First Amendment as we construe it today, does not prohibit the state from insuring that the stream of commercial information flows cleanly as well as freely [425 U.S. at 771].

Similarly, cases decided since *Virginia Pharmacy Board* have found it constitutionally permissible to limit commercial speech to protect against possible misleading advertising or to safeguard the free flow of information. See, for example, *Friedman v. Rogers*, 440 U.S. 1, reh. denied 441 U.S. 917 (1979) in which this Court held that a prohibition on the use of tradenames in the practice of optometry is a constitutionally permissible limitation on commercial speech to protect against possible misleading or deceptive advertising practices.

In addition to recognizing a state's continued ability to regulate commercial speech which is false, misleading or deceptive, the Supreme Court in *Virginia Pharmacy Board* pointed out that the advertisements there were not proposing a transaction which was illegal in itself, *Virginia Board*, 425 U.S. at 772. Thus, the Court kept intact its previous decision in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, reh. denied 414 U.S. 881 (1973). In that case this Court held that a municipal ordinance as construed to forbid a newspaper from printing "help wanted" advertisements under sex-designated columns for certain job opportunities does not violate First Amendment rights of the press. The Court viewed the sex-designated columns as further-

ing the advertisers' illegal sex preference in hiring decisions and thus an impermissible "aid" to an employment practice declared unlawful under the Pittsburgh ordinance. Significantly, the Court opined:

Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity. [*Id.* at 389].

See also *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978). (State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity). As later interpreted in *Central Hudson Gas v. Public Service Commission*, 447 U.S. 557, 563 (1980), and as the court below recognized, it is incumbent on the petitioner to establish as a threshold that the commercial speech at issue "at least must concern lawful activity and not be misleading," to come within the protection of the First Amendment (A. 6). When a communication is found to be misleading, a state need not assert a substantial interest in order to prohibit it. *In re R.M.J.*, 455 U.S. 191, 203 (1982).

Against this background we come to a consideration of the facts of the instant matter which involves a statute prohibiting one limited mechanism of advertising activity deemed inimical to the public interest by the Legislature—that is rebates—by the particular method of rebating at issue, discount prescription coupons. In New Jersey the practice of pharmacy has been found to vitally affect the public health and welfare and thus be subject to regulation. *Supermarkets General Corp. v. Sills*, 93 N.J. Super.

326, 225 A.2d 728 (Ch. Div. 1966). The Legislature, in establishing such regulation, determined that the public interest mandated a prohibition on certain activities including the practice at issue here:

The distribution of premiums or rebates of any kind whatever in connection with the sale of drugs and medications provided, however, that trading stamps and similar devices shall not be considered to be rebates for the purposes of this chapter and provided further that discounts, premiums and rebates may be provided in connection with the sale of drugs and medications to any person who is 62 years of age or older. . . . [N.J.S.A. 45:14-12(f)].

That determination appropriately could have been predicated on the Legislature's belief that rebates were inimical to the public interest because rebating activities by licensed pharmacists would either foster unfair competition or foment price wars.* Price wars are antithetical to the public interest in that they create chaotic economic conditions in which it is inevitable that some competitor pharmacies will be eliminated altogether, thus reducing the availability of vital pharmacy services and prescrip-

*Support for the view that the Legislature did wish to eliminate unfair competition and prevent price wars in the pharmaceutical industry can be found in the subsequently enacted New Jersey statute relating specifically to advertising of the price of prescription drugs. N.J.S.A. 24:6E-2 proscribes the advertising of prescription drugs for a price lower than the acquisition cost as follows:

. . . The Director of the Division of Consumer Affairs shall promulgate rules and regulations governing the advertising of prescription drugs. Such rules shall include . . . the following . . . (3) provisions prohibiting the advertising for sale of a prescription drug at a retail price below the acquisition cost of the drug to the retail seller.

tion drugs to the public. See *Fried v. Kerwick*, 34 N.J. 68, 167 A.2d 380 (1961).

The Legislature may also have acted upon its belief that prescription coupons are misleading. Thus while coupons purport to give consumers \$1 off the price of a prescription drug, the coupon does not indicate the purchase price. As a result, the customer does not know whether the purchase price represents the manufacturer's suggested retail price or a price formulated by CVS or a price prevalent among pharmacy store competitors. Nor is the consumer informed as to when the purchase price attained its present level and for how long it will remain at current levels to facilitate a comparison by the consumer of the purchase price at a given point in time with other time periods. Because the inducement of a \$1 rebate in itself conveys no meaningful information to the consumer which enables him to make well-informed economic decisions and because all other price information is withheld, the public is misled as to the true value of the prescription drug purchasing transaction.

Independent of the fact that no meaningful price information is conveyed by this form of advertising, prescription coupons, as distinct from coupons distributed in the sale of other products, have a special potential for misleading the public.² Because the drugs are available only on the authorization of a physician, they are not available to be purchased whenever desired by a consumer. The public generally does not buy a large variety of drugs on a recurring basis as they might purchase such products as soap or shampoo and, therefore, the public is not familiar with the price of prescription drugs over a period of time. The lack of familiarity with prescription drug prices deprives the consumer of the ability to know the pricing context in which the rebate is offered, as compared with

the knowledge of the public through experience with the price of soap or shampoo so that the consumer can readily judge the value of a coupon rebate.

It is apparent therefore that as a result of the Board's declaratory ruling no restraint has been imposed on the "free flow of information" regarding prescription drug prices. Rather, as was the case in *Friedman v. Rogers*, *supra*, the State's prohibition of this limited advertising activity does not deny the public any price specific information, but prevents the advertising of price related, but ultimately meaningless information to the consumer. Prohibition of the use of these coupons is permissible, since the coupons constitute "a form of commercial speech that has no intrinsic meaning" with "possibilities for deception [that] are numerous" *Id.* at 12-13.

Nor is there merit to appellant's bald claim, notably not briefed for the Court, that the anti-rebate statute (N.J.S.A. 45:14-12(f)) is unconstitutional as a denial of equal protection. Contrary to appellant's assertion, the Senior Citizen exemption to the anti-rebate provision is a permissible exercise of the legislative judgment. Notwithstanding that the Legislature intended to prevent price wars or eliminate unfair competition by the enactment of the anti-rebate provision, they could still determine to allow an exemption to one limited group. See *New Orleans v. Dukes*, 472 U.S. 297 (1976); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). The Legislature may have perceived no need to extend the ban on rebates and premiums to sales of prescription drugs to those 62 years of age or older because the lawmakers saw no threat to the economic viability of pharmacies posed by discounts utilized by this portion of the population.

It is entirely proper for the Legislature to determine to deal with a perceived evil as it sees fit, one aspect at a time and it may adopt a policy that only partially ameliorates a perceived evil. See *New Orleans v. Dukes*, *supra*, at 303. The Legislature appropriately may have determined that on balance, a small portion of the population (in this instance Senior Citizens) could qualify for an exemption.

In summary, then, this case presents the simple question of whether the Legislature can act to prohibit activity deemed inimical to the public interest—the distribution of rebates for prescription drugs. Because this Court has repeatedly held that commercial speech which is misleading, deceptive or proposes a transaction illegal in itself may be regulated and because N.J.S.A. 45:14-12(f) is not a prohibition which blocks the flow of information enabling consumers to make considered commercial decisions, but rather ensures the free flow of information, the Appellate Division of the Superior Court of New Jersey properly upheld the Board's declaratory ruling and no purpose would be served by further review. As the ruling below was clearly correct and the present appeal presents no substantial constitutional question, the appeal should be dismissed or the ruling below summarily affirmed.

CONCLUSION

For the reasons stated herein, this appeal should be dismissed or in the alternative the judgment of the Superior Court of New Jersey, Appellate Division affirmed.

Respectfully submitted,

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Deputy Attorney General

By: SANDRA Y. DICK
Deputy Attorney General

Dated: February 21, 1984

* Member of the Supreme Court Bar.

APPENDIX A

Order of the Supreme Court of New Jersey

SUPREME COURT NEW JERSEY

M-410 September Term 1983

21,598

**IN THE MATTER OF THE BOARD OF PHARMACY
DECISION TO PROHIBIT THE USE OF ADVER-
TISEMENTS CONTAINING COUPONS FOR PRE-
SCRIPTION DRUGS, etc.**

This matter having been duly presented to the Court, it is ordered that the motion of Consumer Value Store (CVS) for reconsideration of denial of petition for certification is denied.

Witness, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 17th day of January, 1984.

STEPHEN W. TOWNSEND
Clerk

Filed: Supreme Court of New Jersey
January 18, 1984

MAR 10 1984

ALEXANDER L. STEVAS,

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

IN THE MATTER OF THE BOARD OF PHARMACY
DECISION TO PROHIBIT THE USE OF ADVER-
TISEMENTS CONTAINING COUPONS FOR PRE-
SCRIPTION DRUGS AND THE ISSUANCE AND
REDEMPTION OF PHARMACY PRESCRIPTION
COUPONS,

CONSUMER VALUE STORES (CVS)

A Division of Melville Corporation,

Appellant.

On Appeal from the Superior Court of New Jersey,
Appellate Division

**BRIEF IN OPPOSITION TO MOTION OF APPELLEE
NEW JERSEY STATE BOARD OF PHARMACY TO
DISMISS OR AFFIRM**

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NO. 83-1224

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IN THE MATTER OF THE BOARD OF PHARMACY
DECISION TO PROHIBIT THE USE OF ADVER-
TISEMENTS CONTAINING COUPONS FOR PRE-
SCRIPTION DRUGS AND THE ISSUANCE AND
REDEMPTION OF PHARMACY PRESCRIPTION
COUPONS,

CONSUMER VALUE STORES (CVS)

A Division of Melville Corporation,

Appellant.

On Appeal from the Superior Court of New Jersey,
Appellate Division

**BRIEF IN OPPOSITION TO MOTION OF APPELLEE
NEW JERSEY STATE BOARD OF PHARMACY TO
DISMISS OR AFFIRM**

The appellant Consumer Value Stores (CVS) pursuant to Rule 16.5 respectfully submits this brief opposing motion of appellee New Jersey State Board of Pharmacy to dismiss or affirm.

Statement of the Case

Appellant Consumer Value Stores (CVS) will rely on the Statement of the Case included in its Jurisdictional Statement.

ARGUMENT

POINT I

Discount coupons are protected commercial free speech and are not meaningless or misleading as appellee claims.

Appellee, New Jersey State Board of Pharmacy, brands prescription discount coupons (rebates) as commercial speech which is false, misleading, deceptive or which proposes a transaction illegal in itself. As a result, the Board claims prescription discount coupons do not fall within the protective scope of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976).

Virginia State Board of Pharmacy, supra, at 750, however, struck down in its entirety the Virginia statute which provided in pertinent part that a pharmacist is guilty of unprofessional conduct if he "publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription" (emphasis added). In striking down the statute in its entirety as being violative of First Amendment free speech guarantees, the Supreme Court did not make any distinction between drug advertising generally and its more particularized form, that of coupon advertising.

The Appellee attempts to evade the clear mandate of the *Virginia State Board of Pharmacy* Court by simply labeling discount coupons as commercial speech which is false, deceptive or misleading. By employing this reasoning, the New Jersey Board of Pharmacy is basing its argument on either one of two premises: (1) that the information contained in Consumer Value Stores' coupons was false or misleading or (2) that discount coupons are an inherently illegal form of advertising.

In support of the first assertion, the appellee states that rebate activities by licensed pharmacists would either foster unfair competition or foment price wars. From 1976 to 1981 the Attorney General's office chose not to enforce N.J.S.A. 45:14-12(f), thus permitting the use of discount prescription coupons. Despite ample opportunity to gather historical data during this period, the Attorney General has failed to introduce tangible evidence of price wars or incidents of unfair competition. Certainly, the appellee's failure to offer such evidence severely undermines the credibility of its argument.

In addition to the above-mentioned accusation, the appellee advances the argument that discount prescription coupons are meaningless, and therefore misleading, since they allow a "dollar off" the price without stating the purchase price. This argument ignores the realities of discount coupons and consumer purchasing habits. Presently, consumers can freely request prices from pharmacists or obtain price lists. As a result, consumers can easily obtain the complete price picture, especially if they comparison shop. Thus, the focus should be whether the information contained in the coupon is itself misleading or deceptive.

On various occasions, the Supreme Court has discussed the concept of deceptive or misleading advertising. In

Bates v. State Bar of Arizona, 433 U. S. 350 (1977) the Court held that a blanket suppression of advertising by attorneys violated the free speech guarantees of the First Amendment. The Court noted the distinction between mere *price* advertising and advertising claims relating to the *quality of services*. The latter was probably "not susceptible of precise measurement or verification and under certain circumstances might well be deceptive or misleading." 433 U. S. at 366. When, however, the factual claims contained in commercial *price* or product advertisement relate to tangible goods or services, they may be tested empirically and corrected to reflect the truth without in any manner jeopardizing the free dissemination of thought. *Virginia State Board of Pharmacy*, *supra* at 78 (J. Stewart concurring) (emphasis added).

Clearly, the information contained in the subject coupon advertisements is of the sort that can be tested empirically. Basically, the coupons disclose to the consumer how much of a discount he will receive if he redeems the coupon at the stated location. The fact that coupons do not provide a complete foundation for price dissemination is not crucial. In *Virginia State Board of Pharmacy* the Court considered whether pharmacists should be required to provide this more complete foundation. The Court observed "(the) pharmacist . . . could cast himself as a commentator on store to store disparities in drug prices giving his own and those of a competitor as proof. We see little point in requiring him to do so and little difference if he does not." 425 U. S. at 747-748.

The underlying rationale for extending First Amendment protection to advertisements not providing a complete and total foundation for price dissemination is based on the consumer's keen interest in the dissemination of *any* information whatsoever. The *Bates* Court observed

that "(i)t seems peculiar to deny the consumer, on the grounds that the information is incomplete, at least some of the relevant information needed to reach an informed decision." 433 U. S. at 374. Thus, "(e)ven when advertising communicates only an incomplete version of the relevant facts the First Amendment presumes that some accurate information is better than no information at all." *Central Hudson Gas v. Public Service Commission*, 447 U. S. 557, 562 (1980).

Furthermore, the appellee's argument is logically inconsistent. According to its position, a continuance of discount prescription coupons would mislead the public under the age of sixty-two years of age, but not those sixty-two or older. If as claimed, discount prescription coupons are meaningless and patently misleading, why has the Attorney General and the New Jersey Legislature refused to extend this protection to senior citizens, a group, one would think, that merits added protection? The appellee has failed to explain this glaring inconsistency.

The appellee's other possible assertion is that coupons purporting to give consumers "X dollars" off the price of a prescription drug is an inherent illegality. Although appellee attempts to distinguish prescription drug coupons from those used for other consumer products, in reality, they are clearly analogous. Therefore, the appellee's claim could serve as a precedent to ban all forms of coupon advertising. Since the Court has not ruled on the legality of this form of advertising, it is of great import that the Court provide a definitive statement concerning the use of discount coupons and rebates in advertising. Appellant submits that discount coupons are a mechanism of protected commercial free speech under the First Amendment of the Constitution of the United States.

POINT II

The current provisions contained in N.J.S.A. 45:14:12(f) for a senior citizen's discount is violative of constitutional guarantees of equal protection under the Fourteenth Amendment.

The standard of review applicable to cases arising under the Equal Protection Clause is the "rational basis" test. See *Vance v. Bradley*, 440 U. S. 93 (1979). In effect, the legitimate purpose of the statute must bear a rational relationship to the classification. The appellee argues that the interests sought to be advanced by N.J.S.A. 45:14-12(f) are the prohibition of activities which foment price wars and which mislead the public. The appellee, though, has failed to introduce tangible evidence that these asserted "interests" were those considered by the New Jersey Legislature in enacting N.J.S.A. 45:14-12(f).

Nothing in either the language of the statute or in its legislative history supports the appellee's position. Instead, the appellee in its brief, conjectures as to the legislative intent. Such conjecture ignores the legislative intent indicated by the plain language of the statute. See *R. H. Macy & Co., Inc. v. Director, Division of Taxation*, 77 N. J. Super. 155, 174 (App. Div. 1962), *aff'd o.b.*, 41 N. J. 3 (1963) (argument offered as to the probable legislative intent cannot prevail against plain statutory language to the contrary). N.J.S.A. 45:14-12(f) defines certain acts as "grossly unprofessional conduct." The New Jersey State Board of Pharmacy has assumed the view that coupon advertising constitutes such conduct since it involves the giving of a "rebate" or premium as prohibited by subsection (f). The Court has explicitly declared in *Virginia State Board of Pharmacy, supra*, at 769, however, that a ban on prescription drug price ad-

vertising has no effect on professional conduct. Thus, the Court should look to the plain language of the statute to cull the legislative purpose for use in the "rational basis" test.

The appellee has failed to show a rational basis between the age classification and the statute's plain purpose, as noted above. In support of its position, appellee speculates that the Legislature "*may have perceived*" no need to extend the prohibition of rebates to those sixty-two years of age or older since the Legislature might not have seen a threat to the economic viability of pharmacies because they represent a small portion of the population.

Even the sheer speculation of the appellee's argument is without merit. Apart from the fact that senior citizens comprise an ever increasing percentage of the population, their special needs for prescription drugs are generally far greater than the needs of New Jersey's younger populace.* Accordingly, if coupon advertising was such a threat to the economic viability of pharmacies, it would be no less so by being limited solely to senior citizens.

* According to recent national statistics, consumers of any age fill an average of 4.3 prescriptions per year. However, the average number of prescriptions filled by persons over the age of 65 is 10.7 per year. The total dollar volume of prescription drug sales is approximately \$5.7 billion dollars. Sales to senior citizens account for \$1.6 billion dollars or 28 per cent of total sales. Division of Health Interview Statistics of the National Center for Health Statistics, National Medical Care Expenditures, National Interview Health Survey (1978).

POINT III

The Superior Court of New Jersey, Appellate Division, by stating that coupon advertising of prescription drugs is an unlawful activity, erred in refusing to apply First Amendment analysis.

Under the principles espoused in *Virginia State Board of Pharmacy* and its progeny, which delineated the scope of protection afforded commercial speech, any regulation of price advertising which is truthful, informative and useful to the public must receive careful scrutiny under First Amendment analysis. The Court, though, has declared that advertising that proposes a transaction that is itself illegal, *Virginia State Board of Pharmacy, supra* at 772; *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U. S. 376, 389 (1973), or that promotes or encourages an illegal activity, *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 496 (1982) may fail to qualify for First Amendment analysis.

The Superior Court of New Jersey, Appellate Division, seized upon the "unlawful activity" exception, thus avoiding the First Amendment analysis mandated by this Court. In its logically flawed reasoning the Appellate Division simply stated that since N.J.S.A. 45:14-12(f) banned coupon advertising of prescription drugs, that form of advertising constituted an "unlawful activity". Providing the consumer with a discount coupon cannot realistically be considered an inherently illegal activity. Thus by labeling discount coupon advertising as an "unlawful activity" the Appellate Division failed to apply the mandated test espoused by the Court in *Central Hudson Gas v. Public Service Commission*, 447 U. S. 557 (1980). As a result, the Appellate Division failed to apply the precepts set

down in *Virginia State Board of Pharmacy* and, as such, circumvented full consideration of the real issue at hand, that is, the constitutionality of N.J.S.A. 45:14-12(f).

CONCLUSION

For the reasons stated herein, this appeal should be granted and the Motion of Appellee New Jersey State Board of Pharmacy to dismiss or affirm should be denied.

Respectfully submitted,

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Dated: March 9, 1984